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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 870

JOHN L. FAHS, U. S. COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

NEW DEAL CAB COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the District Court (R. 273-281) is not reported. The opinion of the Court of Appeals (R. 286-290) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1949. (R. 290.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the drivers of respondent's taxicabs in 1941 through 1943 were respondent's employees and their earnings thus wages subject to the social security taxes imposed under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act contained in the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are set forth in the Appendix to the petition for certiorari in *Fahs* v. *Economy Cab Co.*, No. 869, filed herewith.

STATEMENT

This is a suit for the recovery of social security taxes collected from the New Deal Cab Company, a corporation, under the Federal Insurance Contributions Act for the quarters ending March 31, 1941, through December 31, 1943, in the amount of $4,626.63 and under the Federal Unemployment Tax Act for the years 1941 through 1943 in the amount of $1,387.99. (R. 274.) The District Court held that the drivers of the company's taxis were the company's employees for social security purposes and that the taxes had therefore been legally collected. (R. 273-281.) The Court of Appeals for the Fifth Circuit reversed, holding that the drivers were not the company's employees. (R. 286-290.)

The facts, as found by the District Court (R. 274-280), are substantially as follows:

During the period in question the New Deal Cab Company was engaged in furnishing un-

metered, or "zone", taxicab service to the colored population of Jacksonville, Florida, under the names of "New Deal" and "Lincoln". The company operated approximately fifty cabs under a city permit which was issued in its name. It also operated approximately fifty more cabs under a permit originally issued to another cab company and which it acquired covering the Lincoln cabs. All cabs were owned by the company, were operated from the same location, used the same facilities and followed the same methods and practices. (R. 274.)

These cabs were painted the same distinctive design and colors, bore the name New Deal or Lincoln Cab and carried the company phone and identifying numbers. The cabs carried nothing to identify them as being connected with the men driving them. (R. 274.)

Besides the drivers in question the company employed a substantial number of other persons who worked in the office and garage and serviced the cabs. During the period involved, due to financial difficulties, the company's cabs were old and in poor condition so that their value was relatively low. Notwithstanding this fact, the company's investment in cabs and other facilities necessary to the conduct of the business then amounted to about twenty thousand dollars. (R. 275.)

The company operates its cabs two shifts each day. Thus, it has in the neighborhood of 200 drivers to operate the cabs. These drivers were

secured in various ways similar to the manner in which any employer might acquire hired help. When engaged, however, all drivers were required to follow the same hiring routine. When a driver applies to the company seeking to drive a cab he is required to furnish letters of reference as to his character and ability. If he is considered satisfactory to the company he is sent to the Cab Inspector for examination and the issuance of a cab driver's permit. He is also sent to a doctor for a physical examination, largely for the purpose of ascertaining whether he is free of any disease which might interfere with his ability to properly operate the cab. If he satisfactorily meets all of the company requirements he is assigned a cab and a shift, and he is required to post a $10 bond to guarantee payment of the so-called "rental" on the cab. He is also required to purchase a chauffeur's cap which he is supposed to wear while on duty. All together he has an investment required by his job of about $15. (R. 274.)

The public liability insurance covering the operation of the cabs is carried by the company and, except for a nominal liability in case of negligence, the driver is not responsible for any damages done to a company cab. Such losses are borne by the company. The nominal liability of a driver is governed by a contract between the company and the drivers' union. Other working conditions of the drivers are also covered by the agreement with

the union, which is a local affiliated with the American Federation of Labor. (R. 276.)

During the period in question the cabs were not equipped with meters but were operated on a system of zone rates and were known as ten cent cabs. This rate applied to group riding with each passenger paying ten cents within the first zone. (R. 276.)

The zone rates, by the union contract terms, are purportedly set by agreement between the company and the union. However, this provision of the contract has not always been complied with; new rates have been set by the company, and the drivers required to charge the rates on penalty of discharge. The present union contract, with supplemental changes, has been in force since August, 1942, and was preceded by similar contracts. (R. 11-24, 276.) [1]

The portion which the company receives as its share of the income of the cab is a fixed amount per shift. The cabs are operated two shifts a day with a day driver and a night driver. The company income from this source is approximately $900 a day. The drivers are required to purchase all gasoline used in the cabs from the company; they are to pay two cents under the retail price, but not less than three cents over the cost to the company. The company keeps itself informed of the average

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[1] The provisions of the contract, which was introduced in evidence, were made a part of the findings by reference. (R. 276.)

income of the drivers, which information serves as the basis for determining the company's share of the earnings of the cab. (R. 276-277, 14-15.)

The company carries display advertising in the telephone directory and maintains a central switchboard for calls from the public seeking cabs. During the period involved it also maintained several call boxes located in different parts of the city which were used by the drivers for reporting to the company. (R. 277.)

Besides maintaining facilities for gassing, washing and servicing the cabs, the company operates a garage for keeping the cabs in repair and running order. (R. 277.)

During the period in question, when a driver was taken on by the company he had to be a member of the drivers' union or he had to apply for and be accepted as a member of the union under the closed shop agreement between the company and the union. (R. 277.) If no cab is available when a driver is hired, he is put on the "extra board" and he is permitted to drive such cabs as may be available from regular drivers who are temporarily not driving. (R. 277.)

When a driver receives a regular assignment he uses the same cab every day on the shift to which he is assigned. (R. 278.) Cabs are assigned on a seniority basis, that is, when a new cab is received a driver is permitted to "bid" on the cab if he desires. The driver with the greatest seniority is entitled to drive the cab on his shift. He is then

ineligible to bid on another cab for a period of eight months. (R. 278.)

While a driver is operating a cab he is subject to the direction of the company as to his conduct so far as the nature of an unmetered cab business will permit. The company gives him general instructions when he is first engaged, and from time to time further instructions are posted on the company's bulletin board. Company officials cruise the city and observe infractions of the rules. Failure to observe the company rules may result in the driver being penalized or discharged. Under the union contract, however, a grievance hearing may be held between the company and the union where the driver is given an opportunity to present his side of the case, or the matter in controversy may be referred to a board of arbitration for decision. (R. 278.)

The drivers are entitled to a day off every ten days, and in case of sickness must report to the company at least five hours in advance of his shift. Temporary leave of absence for a period of not more than thirty days may be taken by a driver upon the written permission of the union and company. Such an absence does not forfeit a driver's seniority rights, provided he does not engage in any other business during the leave of absence. A driver likewise retains his seniority when he is employed by the company or the union in a salaried position. (R. 278-279.)

The drivers do not hold a permit or license from the city authorities to operate a taxicab business although they are required to, and do, hold a driver's permit. Nor do they have a business privilege or occupational license. (R. 279.)

The drivers work regularly for the company, and the employment arrangements contemplate a continuing relationship rather than one for a fixed period of time. On the average the drivers work for the company several years and, in some cases, many years. The drivers have no other business or means of livelihood. They do not advertise or in other ways hold themselves out as being independent taxicab operators. If their relationship with the company should be terminated they would be unemployed in the ordinary sense of that word. (R. 279.)

The remuneration of a driver is controlled by the terms of the contract between the company and the union and consists of the excess of fares over the cost of gasoline and oil and a fixed amount per shift representing the company's share of the earnings of the cab. (R. 279.) The earnings of the drivers are relatively small, amounting to no more than ordinary wages. (R. 279.) The work of the drivers requires no peculiar skill not possessed by any capable automobile or truck driver. (R. 279.)

Except for the fact that a driver's remuneration for his labor may be greater or less from day to day, depending on the varying public demand for

cab service, the employment of the driver affords no opportunity for profit or loss. (R. 280.)

Besides the $10 bond and the value of a chauffeur's cap and badge required by the company rules, the drivers have no investment in facilities necessary to performance of the services involved. (R. 280.)

The operation of the cabs by the cab drivers constitutes a part of an integrated economic unit devoted to the business of furnishing cab service to the colored population of Jacksonville and for which business the company, alone, is licensed. (R. 280.)

Considering the nature of the business and the irresponsible class of workers involved, the degree of control exercised by the company was substantially the same as would have been exercised if the drivers had been admitted employees. (R. 280.)

The drivers were, as a matter of economic reality, dependent upon the company's business as their sole means of livelihood. (R. 280.)

REASONS FOR GRANTING THE WRIT

This is a companion case to *Fahs* v. *Economy Cab Co.*, which was also decided by the court below on May 3, 1949, and in which we are filing a petition for a writ of certiorari. The question presented in the two cases is the same, and the facts are so similar that, if certiorari is granted in *Fahs* v. *Economy Cab Co.*, certiorari should also be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

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